

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	DETERMINATION
THOMAS G. FARANDA	:	DTA NO. 817884
for Redetermination of Deficiencies or Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law for the Years 1989 through 1993.	:	

Petitioner, Thomas G. Faranda, 66 Elmore Avenue, Croton, New York 10520, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1989 through 1993.

A small claims hearing was held before Arthur Johnson, Presiding Officer, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 8, 2002 at 1:15 P.M., with all briefs to be submitted by May 10, 2002. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Mac Wyszomirski).

ISSUES

I. Whether penalties and a portion of interest assessed against petitioner for the years 1989 through 1993 should be canceled.

II. Whether petitioner or his wife are liable for New York City nonresident earnings tax for the years 1989 through 1993.

FINDINGS OF FACT

1. In or about September 1995, the Division of Taxation ("Division") corresponded with petitioner, Thomas G. Faranda, and his wife Bridgid, indicating that it received information

from the Internal Revenue Service that they filed Federal income tax returns for the years 1989 through 1993 and that the Division could not locate New York returns for the same years. The Division requested petitioner to either provide copies of returns filed or if returns were not filed, to explain his reasons for not filing. Petitioner did not respond to the Division's inquiry.

2. On September 25, 1995, the Division issued a Statement of Proposed Assessment to petitioner and Brigid Faranda for the years 1990, 1991, 1992 and 1993 asserting a penalty of \$950.00 per year pursuant to Tax Law § 685(i). The statement was issued for petitioner's failure to respond to the above correspondence.

On November 15, 1995, the Division received payment of \$3,800.00 from petitioner in response to the assessment. The Division advised petitioner by letter dated November 21, 1995 that the payment did not relieve him of his obligation to file income tax returns for those years and again requested petitioner to send copies of the returns along with applicable wage and tax statements.

3. On November 28, 1997, the Division issued a separate Statement of Proposed Audit Changes for each of the years 1989 through 1992. The basis for the tax assessed in each year was explained as follows:

Information furnished by the Internal Revenue Service, under authorization of section 6103(d) of the Internal Revenue Code, indicates that you filed a federal tax return using a New York State address.

Since we are unable to locate your New York return, and you did not reply to our previous letter, your tax has been computed as a resident of New York State based on the federal information.

The starting point for computing your New York tax is federal adjusted gross income.

The Division asserted additional taxes due for each year as follows: 1989 - \$4,556.47, 1990 - \$5,925.54, 1991 - \$6,631.81, and 1992 - \$3,450.00. The Division also imposed applicable interest and penalties for negligence.

On June 8, 1998, the Division issued a Statement of Proposed Audit Changes for 1993. The statement indicated that the Division received petitioner's 1993 return on May 12, 1998. The Division corrected the reported itemized deductions, recomputed petitioner's tax liability and assessed taxes due of \$3,305.00, plus penalty and interest.

4. On January 22, 1998, the Division issued a Notice of Deficiency for each of the years 1989 through 1992 asserting the above taxes due, plus penalty and interest. The notice for 1989 reflected a payment/credit of \$1,294.20. On August 3, 1998, the Division issued a Notice of Deficiency for 1993 asserting tax due of \$3,305.00 plus penalty and interest. The notice issued indicated a payment/credit of \$950.00 which represented the penalty paid in 1995 for failure to file a return for that year.

5. On May 12, 1998, petitioner and his wife Brigid filed joint New York State resident income tax returns for the years 1991 and 1992. The returns for tax years 1989 and 1990 were filed on September 20, 1999.

6. Petitioner timely protested all the notices of deficiency by filing a Request For Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). The controversy could not be resolved with BCMS and on March 17, 2000, it issued a Conciliation Order sustaining the notices of deficiency. The order noted that petitioner had paid \$3,800.00 and that \$950.00 should be applied to the notices issued for 1990, 1991, 1992 and 1993. Petitioner, in response to the Conciliation Order, filed a timely petition with the Division of Tax Appeals and this proceeding ensued.

7. The wage and tax statements attached to petitioner's tax returns filed for the years 1989, 1990 and 1991 indicated that petitioner's and his wife's employers had a New York City address. The employer of Brigid Faranda withheld New York City income tax. Petitioner's employer did not withhold any New York State or City income taxes. The tax returns filed for the years 1989 through 1993 did not report any New York City nonresident earnings tax for either petitioner or his wife.

8. The Division's representative at the hearing agreed to recompute the Farandas' joint tax liability for each year based on the Federal and State tax returns filed allowing for appropriate deductions and taxes withheld. However, the representative indicated he intended to assert a greater deficiency by calculating the New York City nonresident earnings tax for both petitioner and his wife. The basis for asserting such tax was the W-2's showing employers with a New York City address.

On February 7, 2002, the Division's representative submitted the following recomputations of tax due:

YEAR	NEW YORK STATE TAX	NEW YORK CITY TAX
1989	\$4,078.00	\$56.00
1990	4,244.00	54.00
1991	3,814.00	120.00
1992	3,439.00	
1993	3,490.00	

The amount of New York City taxes withheld from the wages of petitioner's wife exceeded her liability.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner does not dispute that he failed to timely file returns and pay New York State income tax for the years 1989 through 1993. Petitioner is seeking cancellation of the penalties and a reduction of the interest charges. He believed that the payment of the amount assessed by the Division on November 15, 1995 settled any tax liabilities for the years 1990, 1991 and 1992. Petitioner denied ever receiving the letter from the Division dated November 21, 1995 advising him that the payment did not relieve him of his obligation to file income tax returns for those years. Petitioner argued that the letter was likely not delivered because it was addressed to Elmora Avenue instead of Elmore Avenue. The address in all other respects was correct. It should be noted that the assessment he paid was also mailed to Elmora Avenue. In January 1997, petitioner filed for amnesty under the program that ran from November 1996 through January 31, 1997 for the tax year 1994. On April 7, 1997, the Division notified petitioner that amnesty was granted for 1994. Petitioner argued that he would have filed for amnesty for the years 1990, 1991 and 1992 at the same time if the Division had properly notified him of outstanding tax liabilities for those years. Petitioner maintained that the statements of proposed audit changes issued on November 28, 1997 and June 8, 1998 were the first indications he had of taxes being owed for those years. He also claimed that was his first notification that a tax return for 1989 had not been filed. Based on the forgoing arguments, petitioner believes that all penalties should be canceled and interest be adjusted to an amount as if he had been granted amnesty for the years 1989 through 1993 at the same time his 1994 application was approved.

With respect to the New York City nonresident earnings tax, petitioner does not dispute that his wife was subject to the tax but the amount of tax due was less than the tax withheld by her employer. Petitioner explained that he was an insurance agent and did not use the New York

City office to see clients or conduct any business. The New York address was on the W-2's only because it was the main office of the marketing group he was affiliated with. For this reason, petitioner argued that he is not subject to the New York City tax.

10. The Division argued that it is unreasonable for petitioner to believe that paying a penalty of 950.00 relieved him of his responsibility to file a tax return for the years 1990, 1991, 1992 and 1993. Moreover, the Division had no obligation to advise petitioner what he should include on the amnesty application.

The Division took the position that a New York City employer shown on petitioner's W-2 was sufficient evidence to determine he was liable for New York City nonresident earnings tax.

CONCLUSIONS OF LAW

A. Tax Law § 689(e) places the burden of proof on petitioner to show that the notices of deficiency herein are erroneous. In the instant matter, petitioner's arguments with respect to the penalties and interest imposed by the Division are without merit. He presented no credible evidence to establish that any portion of the penalties and interest were erroneously or improperly assessed.

B. Tax Law § 689(d)(1) provides that the Division may determine a greater deficiency than asserted in a notice of deficiency if the claim is asserted at or before a hearing. Tax Law § 689(e)(3) places the burden on the Division to establish that it is entitled to such greater deficiency. The Division failed to present sufficient evidence to sustain its burden of proof to show that petitioner was subject to New York City nonresident earnings tax. However, with respect to his wife, Brigid Faranda, the Division did establish that the greater deficiency was properly asserted. As indicated in Finding of Fact "9", Mrs. Faranda's New York City tax

liability was less than the taxes withheld by her employer. The refund of the overpayment however, is barred by the statute of limitations.

C. The petition of Thomas G. Faranda is granted to the extent indicated in Conclusion of Law "B" and the New York State taxes due are revised to the amounts reflected in Finding of Fact "8". The Division of Taxation is hereby directed to modify the notices of deficiency issued January 22, 1998 and August 3, 1998 consistent with this determination, and except as so modified, the petition is in all other respects denied.

DATED: Troy, New York
July 25, 2002

/s/ Arthur Johnson
PRESIDING OFFICER